NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

ALEXANDER VASQUEZ,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

BEAU B. BRINDLEY
Law Offices of Beau B. Brindley
53 West Jackson Blvd., Suite 1410
Chicago, IL 60604
Telephone: (312) 765-8874
bbrindley@brindleylaw.com
Counsel for Petitioner

QUESTION PRESENTED FOR REVIEW

1. Did the Seventh Circuit violate this Court's precedent on harmless error when it focused its harmless error analysis solely on the weight of the untainted evidence without considering the potential effect of the error (the erroneous admission of trial counsel's statements that his client would lose the case and should plead guilty for their truth) on this jury at all?

2. Did the Seventh Circuit violate Mr. Vasquez's Sixth Amendment right to a jury trial by determining that Mr. Vasquez should have been convicted without considering the effects of the district court's error on the jury that heard the case?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

TREATISES

IN THE SUPREME COURT OF THE UNITED STATES

ALEXANDER VASQUEZ,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITEDSTATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Alexander Vasquez, respectfully prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on March 14, 2011.

OPINIONS BELOW

On March 14, 2011, the Seventh Circuit issued a published opinion, affirming Mr. Vasquez's conviction. *United States v. Vasquez*, No. 09-4056, 635 F.3d 889 (7th Cir. Mar. 14, 2011).[1]

[1] A copy of the Opinion is attached hereto as Appendix

JURISDICTION

The judgment of the court of appeals was entered on March 14, 2011. Mr. Vasquez filed a Petition for Rehearing, which was denied on May 10, 2011.[2] This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

A.

[2] A copy of the order denying Mr. Vasquez's petition for rehearing is attached. as Appendix B.

Fed. R. Crim. P. 52(a).

> (a) Harmless Error.
>
> Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
>
> (b) Plain Error.
>
> A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

28 U.S.C. § 2111 (Harmless Error).

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

INTRODUCTION

This is a case where a federal Circuit Court of Appeals found that the erroneous admission, for the truth of the matter asserted, of trial counsel's out-of-court statement that his client was guilty was harmless. The Seventh Circuit was only able to reach this conclusion by failing to apply, and misapplying, this Court's precedent regarding harmless error analysis. Courts and legal scholars have long

recognized this Court's conflicting jurisprudence in the area of harmless error analysis. In some cases, the test for harmless error requires one to ask only whether a jury in a hypothetical retrial without the error would surely convict. In other cases, the test asks whether the error had any influence on the jury in this particular case. The majority below relied exclusively on the former, reviewing only what it believed to be overwhelming evidence and failing to consider the prejudicial impact of the erroneously admitted evidence in any way. This conflict between the two tests for harmless error appears in the decisions of nearly every federal circuit court of appeal.

It is not a circuit split in the purest sense because there are no cases in which one circuit explicitly cites another circuit's decision and disagrees with its holding. However, a close look at the harmless error doctrines that have developed in the circuits demonstrates an alarming lack of uniformity. This kind of circuit split is even more important to remedy because it deprives defendants (and the government) of consistency and predictability.

By choosing to look solely to the weight of the government's evidence to conduct the harmless error analysis, the majority below was able to ignore clear indications that the error in this case was central to the jury's decision. The Court should grant *certiorari* to clarify the proper mode of harmless error analysis and ensure that this essential appellate function is performed consistently across the circuit courts of appeal. To allow appellate courts to hypothesize a guilty verdict based solely upon the government's evidence without any concern for the actual effect of

the error (as the majority did in this case) would be to deprive defendants of their right to a jury trial under the Sixth Amendment, as this Court warned in *Sullivan v. Louisiana*.

I.

STATEMENT OF THE CASE

A. District Court Proceedings.

Mr. Vasquez was charged in a two-count indictment with (1) conspiracy to possess with intent to distribute more than 500 grams of cocaine, and (2) attempt to possess with intent to distribute more than 500 grams of cocaine. Each count was an alleged violation of 21 U.S.C. § 846. The district court had original jurisdiction under 18 U.S.C. § 3231.

Mr. Vasquez elected to go to trial and after a two-day jury deliberation, he was convicted of count one (conspiracy) and acquitted of count two (attempt). At trial, the government presented evidence that Mr. Vasquez and his co-defendant, Joel Perez, were arrested on August 5, 2008. On that day, the government had arranged, through a cooperating informant, for a cocaine deal to take place between Perez, the cooperating informant, and another co-defendant, Carlos Cruz. Cruz and Perez drove to a Shell gas station to meet the cooperating informant. Cruz testified that the plan was for them to inspect the cocaine at the Shell station. If it was acceptable, another meeting was to be set up where money could be exchanged for the cocaine. No money was supposed to be exchanged during this meeting.

When Cruz and Perez arrived, the cooperating informant told them to follow him to another location to get the cocaine. Perez was reluctant to follow the cooperating informant to another location. Instead of following the cooperating informant, Perez walked to an adjacent parking lot where Mr. Vasquez was waiting to pick him up in a black Bonneville. Perez got into the Bonneville and called Cruz on a cell phone. He told Cruz that he was not willing to follow the cooperating informant. Cruz then came to the adjacent parking lot and met with Perez, who was seated in the Bonneville driven by Mr. Vasquez. Prior to that time, Mr. Vasquez had nothing to do with the transaction. He was not involved in the negotiations, was never mentioned to the cooperating informant, and was wholly unknown to Cruz. Evidence showed that, according to Cruz (the government's only testifying cooperating witness), Vasquez was not to play any role in the drug transaction.

After speaking to Perez while he sat in the Bonneville, Cruz then called the cooperating informant and told him that they had the money to purchase the cocaine. A few minutes later, law enforcement agents surrounded the parking lot and attempted to arrest Cruz, Perez, and Vasquez. Cruz, who was outside of the car, was arrested. Perez and Vasquez drove away in the Bonneville. Police found the Bonneville in a nearby parking lot. Perez and Vasquez were arrested not far from the parking lot. Inside the Bonneville, the police found a hidden compartment in the passenger side of the dashboard. The compartment contained $23,000. Uncontradicted evidence from multiple witnesses at trial proved that the Bonneville belonged to and was

exclusively used by Perez and his wife. No evidence introduced at the trial ever indicated that Mr. Vasquez was aware of the compartment in Mr. Perez's Bonneville or had any connection to the money contained therein. The government also introduced evidence under Fed. R. Evid. 404(b) that Mr. Vasquez was previously convicted for his participation in a cocaine transaction with Mr. Perez in 2002.

At trial, Mr. Vasquez called Marina Perez, the wife of Joel Perez, to testify. Mrs. Perez testified that her husband had asked her to pick him up at the parking lot where the failed drug deal took place. She testified that she asked Mr. Vasquez to go in her place due to a disagreement she was having with her husband. Mrs. Perez told Mr. Vasquez to use the Bonneville, which was registered to Perez, because the Bonneville was blocking Mr Vasquez's own vehicle in the garage. She testified that this was the only reason that Vasquez ended up going to the Shell parking lot that day.

After Mr. Vasquez rested his case-in-chief, the government filed an emergency motion to continue the trial based on recordings it had obtained of telephone conversations between Perez and his wife, which were recorded while Perez was incarcerated. Mr. Vasquez objected to the admission of any recordings on the basis of hearsay. The district court allowed the government to introduce the recordings and explicitly held that the recordings would be coming in for the truth of the matters asserted. One of the calls that was played for the jury included second-hand hearsay that Mr. Vasquez's attorney—lead trial counsel—had told Mr. Vasquez that he should plead guilty:

Marin Perez:	So what'd [Vasquez's lawyer] tell [Vasquez]? What did [Vasquez's lawyer] tell him?
Joel Perez:	A blind plea would be good, then he can guarantee this and that. You know what I mean? Just certain things, you know? I got to explain to you.
Marina Perez:	He's telling him about a blind plea also?
Joel Perez:	Yeah, he is. I gotta explain to you. You know what I mean. He says, if you want, have his wife talk to me, this or that. I have to explain to you tomorrow.

Another recording included a conversation where Marina Perez told her husband that Vasquez's lawyer told her that if they went to trial, "everybody is going to lose." These statements were explicitly admitted for their truth. The attorney who addressed the jury in closing was the very same attorney who the jury was told had instructed Mr. Vasquez to pled guilty and had stated that Mr. Vasquez would lose at trial.

The jury deliberated for two days. During deliberations, the jury requested that the district court provide it with a transcript of Marina Perez's testimony. Eventually, the jury came back with a split verdict, acquitting Mr. Vasquez of attempt, but convicting him of conspiracy.

B. Court of Appeals Proceedings

Mr. Vasquez appealed his conviction to the Seventh Circuit Court of Appeals. Specifically, he argued that the district court's admission of the recorded calls between Mrs. Perez and the codefendant was erroneous. The Court of Appeals issued a split decision. All of the members of the panel agreed that it was erroneous to admit the content of the recorded calls for the truth of the matter asserted. However, the majority concluded that any error was harmless. In reaching this conclusion the majority relied solely on its belief that the other evidence of guilt was overwhelming. Specifically, the majority found the fact that Mr. Vasquez fled from the scene and the admission of the prior conviction for possession with intent to distribute from 2002 to constitute overwhelming evidence. In the end, the majority concluded "[t]his evidence, we believe, would have moved the jury to convict Vasquez without a nudge from anything it heard in the government's rebuttal case."

Judge Hamilton dissented on two grounds. First, he did not agree with the majority that the MCC recordings themselves were admissible. Second, he did not agree that the error could be classified as harmless. Judge Hamilton found that "it is difficult to imagine more prejudicial evidence than the erroneously admitted statements of the defendant's own trial attorney advising the defendant to plead guilty." He described this segment of the tapes as "extraordinary." Judge Hamilton used a different harmless error standard than the majority. Judge Hamilton noted that

the harmless error "standard calls upon an appellate court not to become in effect a second jury." He identified the harmless error rule as set forth in *Neder v. United States*, which requires the appellate court to determine whether the party that benefited from the error has demonstrated "that the error complained of did not contribute to the verdict obtained."

Judge Hamilton then engaged in a detailed analysis, focusing on four factors that prevented him from concluding the error was harmless. First, he discussed the "modest strength of the rest of the government's case against Vasquez." Judge Hamilton compared the evidence against Mr. Vasquez with the evidence against the two codefendants. He noted that both of the co-defendants were recorded making arrangements for the purchase of cocaine. He noted that Mr. Vasquez was not recorded at all and that he was never mentioned in any of the recordings. Moreover, the government agents and the confidential informant were expecting only a single customer and knew nothing about Mr. Vasquez until they saw him arrive in Perez's car. He noted, on the other hand, that the government's evidence established that Mr. Vasquez was at the scene of the planned drug meeting, driving a car with a hidden compartment containing money, and that he fled dangerously from the scene. But, Judge Hamilton noted that Marina Perez's testimony "provided an innocent explanation for Vasquez's presence on the scene in the car with the hidden money."

Judge Hamilton surmised that the only evidence, other than the flight evidence, that was arguably inconsistent with Marina Perez's testimony

was the statement by the cooperating co-defenant, Cruz, that Mr. Vasquez stated "[t]ell him we got the money here" while the three defendants were in the Denny's parking lot. Unlike the majority, however, Judge Hamilton did not take Cruz's testimony as uncontroverted fact. Judge Hamilton noted that Cruz was a "cooperating codefendant with powerful incentives to help the government prove its case against Vasquez." He noted that Cruz "admitted having lied to the government about Vasquez on several other subjects." Most importantly, Judge Hamilton noted that "Cruz admitted he first told the government about Vasquez's supposed 'money' comment less than one week before trial."

Judge Hamilton also considered that the jury acquitted Mr. Vasquez of attempted possession with intent to distribute, meaning that the jury did not find all of the government's evidence fully persuasive. Judge Hamilton noted the extreme importance the government attached to Marina Perez's testimony. He described the government's "extraordinary efforts to obtain its admission." Judge Hamilton found further support for this fact in "the government's emphasis on the improper evidence in its closing argument." Finally, Judge Hamilton noted the inherently harmful nature of having the very attorney whose admitted statements indicated that Mr. Vasquez should lose the case address the jury in closing and argue that Mr. Vasquez was innocent. He asserted that the Court's erroneous admission of the recordings left Mr. Vasquez's defense attorney without the credibility necessary to meaningfully argue on his behalf in closing.

Mr. Vasquez then filed a Petition for Rehearing and Rehearing En Banc, arguing that the Seventh Circuit had erred in its harmless error analysis. Mr. Vasquez argued that the harmless error doctrine used by the Seventh Circuit in this case was inconsistent with this Court's precedent and was inconsistent with the decisions of other courts of appeals. The court denied the Petition for Rehearing without comment on May 10, 2011. See Appendix B.

This petition follows.

II.

REASONS FOR GRANTING THE PETITION

A. This Case Exemplifies the Two Competing Modes of Harmless Error Analysis that are Used Throughout the Circuit Courts of Appeal.

The appellate court in this case had concrete evidence regarding the thought process of the jurors who decided the case against Mr. Vasquez. Through its split verdict and its request to review the transcript of Marina Perez's testimony, the jury plainly signaled the centrality of the district court's error (erroneously admitting recorded statements for their truth to discredit Mrs. Perez) to its verdict. The majority below completely disregarded this evidence, failed to address the impact the Court's error might have had on the jury, and asked only whether there was overwhelming evidence of guilt aside from the improperly admitted testimony. On the other hand, the dissent below considered the specific error involved and how it must have influenced the jury in conjunction with the other

evidence. This result begs the question "how could the judges engage in such different modes of analysis?" The answer is that they applied different tests.

Legal scholars and commentators have long recognized that two competing tests have emerged for determining whether an error is harmless. The first test inquires whether the error had any effect on the verdict. The second test inquires whether there was overwhelming evidence of guilt that was untainted by the error. See Gregory Mitchell, 82 Cal. L. Rev. 1335, 1339 (1994) (noting that "courts evaluate harmless error under one of two tests or a hybrid of the two"); Harry T. Edwards, To Err is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?, 70 N.Y.U. L. Rev. 1167, 1170-1171 (1995) (distinguishing between a "guilt-based approach" and an "effect-on-the-verdict-approach" in determining whether an error is harmless); Charles S. Chapel, The Irony of Harmless Error, 51 Okla. L. Rev. 501, 504 (1998) (identifying two tests, one considering "the effect of the error on the verdict," the other requiring "a consideration of the evidence of guilt); Jason M. Solomon, Causing Constitutional Harm: How tort law can help determine harmless error in criminal trials, 99 Nw. U. L. Rev. 1053, 1055 (2005) (noting that "[t]he conventional wisdom on harmless-error doctrine is that there are two different and irreconcilable approaches that judges use in determining harmless error which are reflected in two co-existing lines of Supreme Court cases); Roger A. Fairfax, Jr., Harmless Constitutional Error and the Institutional Significance of the Jury, 76 Fordham L. Rev. 2027, 2037 (2008) (noting that the Supreme "Court has shifted between the two standards – harmlessness based upon whether the error

contributed to the verdict and harmlessness based upon whether the residual evidence was overwhelming"); Jeffrey O. Cooper, Searching For Harmlessness: Method And Madness in the Supreme Court's Harmless Constitutional Error Doctrine, 50 U. Kan. L. Rev. 309, 311 (2002) (tracing the development of "two tests for constitutional harmless error [], one focusing on the effect that the error … had on the deliberations of the jury, and one focusing on whether the evidence properly before the jury was overwhelming"); *Holand v. Attorney General of New Jersey*, 777 F.2d 150, 158 (3d Cir. 1985) (crediting the idea that "the Supreme Court has variously formulated the harmless error standard, in some cases inquiring whether the constitutional error might have contributed to a guilty verdict and in others whether the non-tainted evidence was overwhelming to support the jury's verdict); *United States v. Peck*, 102 F.3d 1319, 1326 (2d Cir. 1996) (Newman, CJ concurring) (noting the uncertainty present in "most cases" of "whether the reviewing court is to consider the effect of the error on the jury or predict what verdict would have been rendered in the absence of the error").

Unlike traditional circuit splits that occur when this Court's precedent leaves a question unresolved, the split regarding harmless error is present not only between the circuits but within circuits. The split decision in this case demonstrates this fact. However, the Seventh Circuit as a whole appears to have endorsed a test focusing solely on the overwhelming nature of the untainted evidence. In *Lanier v. United States*, 220 F.3d 833, 839 (7th Cir. 2000), the Seventh Circuit explicitly endorsed the overwhelming untainted evidence test. In that case, the defendant argued "that

the test for evaluating harmless error is whether it is apparent beyond a reasonable doubt that the error did not contribute to the verdict at all." *Id.* The Seventh Circuit rejected this formulation stating, "this is not the proper test." *Id.* Instead, the panel stated that the test was "is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" *Id.* (citing *Neder v. United States*, 527 U.S. 1, 18 (1999).

Harmless error analysis is probably the most cited doctrine in the criminal law, and its consequences are significant. The outcome of the harmless error analysis means the difference between offering a remedy for an injury to an individual's rights and making the decision that such an injury is an acceptable cost of an expedient criminal justice system. With such significant consequences hanging in the balance, it is imperative that the doctrine be applied consistently.

As the majority opinion and dissent below demonstrate, even within a single circuit, the mode of analysis can differ significantly and result in opposite conclusions. The level of detail of the analysis also varies significantly depending on the test that is used. For instance, the Second Circuit, which tends to utilize the effect of the error test, utilizes an extensive series of factors that requires the reviewing court to engage in a detailed analysis. See *Wray v. Johnson*, 202 F.3d 515, 526 (2d Cir. 1998). In *Wray*, the Second Circuit noted that "the principal factors to be considered are the importance of the witness's wrongly admitted testimony, and the overall strength of the prosecutions case. *Id.* When assessing the importance of wrongly

admitted evidence, the Second Circuit looks to (1) whether the testimony bore on an issue that is plainly critical to the jury's decision, (2) whether the wrongly admitted evidence was material to the establishment of the critical fact or whether it was instead corroborated and cumulative, and (3) whether the wrongly admitted evidence was emphasized to the jury. *Id.*

Had the majority below applied this standard, its analysis would have been wholly different. Instead of focusing narrowly on the other evidence admitted at trial, the majority would have been forced to first address the nature of the error in the context of the trial. The error here meant that the jury heard testimony that defense counsel had stated both his belief that the defendant should plead guilty and his belief that, if the defendant went to trial, everyone was going to lose. This is a unique kind of error. The district court specifically stated that these statements, despite the multiple levels of hearsay, were admitted for the truth of the matters asserted. The matter asserted was the guilt of the defendant, and the matter was asserted by a person who, other than the defendant himself, was probably in the best situation to know. If the alleged statements of counsel were simply accepted by the jury (and why would they not be since they are essentially statements against the interest of the declarant's own client to whom he has a fiduciary duty), then the jury would believe the defendant was guilty independent of any other evidence that was presented. In that sense, the evidence is most properly comparable to a confession. The defendant's guilt is the ultimate issue and a statement that the defendant is guilty is "plainly critical to the jury's decision" in every case. *Wray, 202 F.3d at 526.*

The Second Circuit analysis also directs reviewing courts to determine the extent to which the wrongly admitted evidence was emphasized. The majority and the dissent below differed widely in their analysis in this area. The majority did not even consider the extent to which the wrongly admitted evidence was emphasized. The dissent, on the other hand, specifically noted that the government emphasized the evidence in closing argument. The majority's failure to engage in this analysis generated a different result than would have likely been reached if the Second Circuit's harmless error test were utilized.

The Third Circuit has similarly rejected an approach that focuses solely upon overwhelming evidence. *Gov't of the V.I. v. Martinez*, 620 F.3d 321 (3d Cir. 2010). In *Martinez*, the Third Circuit noted that it had "never held, nor do we now, that the amount of incriminating evidence is the only factor implicated in a *Doyle* harmless-error analysis." *Id.* at 338. "[T]he relevant question … is not whether in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *Id.* at 337 (quoting *United States v. Korey*, 472 F.3d 89, 96 (3d Cir. 2007)).

The Fourth Circuit similarly does not attach conclusive importance to the reviewing court's view of whether there was overwhelming evidence of guilt. The Fourth Circuit considers three factors in determining whether an error is harmless: "(1) the centrality of the issue affected by the error; (2) the steps taken to

mitigate the effects of the error; and (3) the closeness of the case." *United States v. Ingram*, 27 F.3d 564 (4th Cir. 1994). The third factor clearly incorporates whether the reviewing court believes there was overwhelming evidence of guilt. However, the Fourth Circuit has been clear that the purpose of addressing the weight of the evidence is not merely to determine whether the remaining evidence would have been sufficient to convict, "but whether it is sufficiently powerful in relation to the tainted evidence to give fair assurance that the tainted evidence did not substantially sway the jury to its verdict." *United States v. Ince*, 21 F.3d 576, 584 (4th Cir. 1994). The Fourth Circuit has also importantly looked to factual indications that the jury in the particular case under review may have viewed the case as close. See *Untied States v. Curbelo*, 343 F.3d 273, 287 (4th Cir. 2003) (noting that where the jury acquitted defendant on five of eleven counts and the same witnesses testified as to each count, evidence was not overwhelming and a reasonable juror could have found evidence lacking as to the remaining counts absent the error).

The Sixth Circuit has squarely addressed the issue and found that the proper analysis focuses on whether the error in question affected the particular jury that decided the case, not whether there was overwhelming evidence such that an error free trial would surely result in a guilty verdict. *Wilson v. Mitchell*, 498 F.3d 491, 504 (6th Cir. 2007) (noting that the proper analysis looks to "whether the error had an actual impact on the verdict … and not … whether a hypothetical new trial would likely produce the same result").

The Eighth Circuit has announced a test for assessing harmless error in the context of *Doyle* error. Where a *Doyle* violation has been found, the Eighth Circuit looks to four factors: (1) "whether the government made repeated *Doyle* violations," (2) "whether any curative effort was made by the trial court," (3) whether the defendant's exculpatory evidence is transparently frivolous," and (4) "whether the other evidence of guilt is otherwise overwhelming." *United States v. Martin*, 391 F.3d 949, 955 (8th Cir. 2004) (citing *Bass v. Nix*, 909 F.2d 297, 305 (8th Cir.1990)).

The Ninth Circuit explicitly directs courts to look to facts about jury deliberations that tend to demonstrate that an error was not harmless. "Longer jury deliberations weigh against a finding of harmless error because lengthy deliberations suggest a difficult case." *United States v. Lopez*, 500 F.3d 840 (9th Cir. 2007) (quoting *United States v. Velarde-Gomez*, 269 F.3d 1023, 1036 (9th Cir. 2001)). Similarly, the Ninth Circuit has considered the fact that a jury reached a split verdict. *Eslamia v. White*, 136 .3d 1234, 1239 (9th Cir. 1998) ("The prosecution case was far from overwhelming, as evidenced by the fact that the jury took 10 days to deliberate, repeatedly questioned the trial judge about the law and requested the rereading of testimony, and ultimately acquitted Eslaminia on the charge of conspiracy to murder and the lesser offense of solicitation of another to commit the crime of kidnapping").

The Tenth Circuit has phrased the test in different terms, on some occasions asking "whether the jury would have returned the same verdict absent the

error," *United States v. Nash*, 482 F.3d 1209 (10th Cir. 2007), and on other occasions asking whether "the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error." *United States v. Glass*, 128 F.3d 1398 (10th Cir. 1997).

The D.C. Circuit has explicitly considered and rejected an approach that looks exclusively to whether there is overwhelming evidence. In *United States v. Cunningham*, the D.C. Circuit held that "[r]ecent Supreme Court cases, as well as cases from this circuit, have clarified that harmless error review calls for an inquiry as to whether the Government has shown beyond a reasonable doubt that the error at issue did not have an effect on the verdict, not merely whether, absent the error, a reasonable jury could nevertheless have reached a guilty verdict." 145 F.3d 1385 (D.C. Cir. 1998).

The weight of the circuit authority embraces the view that, while overwhelming evidence is an important consideration, it cannot be the sole focus of the harmless error inquiry. Therefore, the greater weight of the circuit authority indicates that the analysis of the majority below was incomplete and insufficient. Courts like the majority below, however, find some support for their exclusive reliance on overwhelming evidence in this Court's conflicting line of cases dealing with harmless error analysis.

B. This Court's Own Precedents are in Conflict Regarding the Appropriate Mode of Harmless Error Analysis.

The varying approaches to, and formulations of, the harmless error standard found scattered throughout the jurisprudence of the Circuit Courts of Appeal can be traced to the inconsistency of this Court's precedent regarding the harmless error analysis. Since the inception of harmless error, the Court has issued varying versions of the harmless error test. The Court first articulated the standard for harmless error in *Kotteakos v. United States*. 328 U.S. 750 (1946). In that case, the Court held that the proper inquiry was not to assess the weight of the untainted evidence. The Court stated:

> it is not the appellate court's function to determine guilt or innocence . . . Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out . . . the question is, not were [the jurors] right in their judgment, regardless of the error or its effect upon the jury. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own.

328 U.S. at 763-764. This formulation of the test was repeated in *Fahy v. Connecticut*. 375 U.S. 85, 86-87

(1963) ("We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction").

Probably the most cited case dealing with harmless error is *United States v. Chapman* where the Court found that harmless error analysis applies to constitutional violations. 386 U.S. 16 (1967). In *Chapman*, the Court formulated the test similarly to *Kotteakos* and *Fahy*: "[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." 386 U.S. at 22. Despite *Chapman*, the majority below did not even begin to ask that question.

The case most frequently cited as originating the alternative standard that an error is harmless when the appellate court finds that the properly admitted evidence was overwhelming is *Harrington v. California*. 395 U.S. 250 (1969). However, in that case, the Court was careful to note that "[w]e do not depart from *Chapman*; nor do we dilute it by inference. We reaffirm it." *Id.* 254.

Next, in *Schneble v. Florida*, the Court seemed to combine the standards, stating that "[i]n some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless

error." 405 U.S. 427, 430 (1972). *Schneble*, however, contains what has become one of the most troublesome formulations of the test, and the one adopted by the majority in this case. At the conclusion of *Schneble*, the Court stated "we conclude that the 'minds of an average jury' would not have found the State's case significantly less persuasive had the testimony as to Snell's admission been excluded." *Id.* at 432. This formulation is particularly problematic because common sense tells us that, in a close case, even evidence that does not make the government's case significantly less or more persuasive could still be outcome determinative due to the prejudicial quality of the error. Perhaps that is the reason that, in the thirty-nine years since *Schneble* was decided, the Court has never again used the "significantly less persuasive" formulation. On the other hand, the Seventh Circuit uses it regularly. See, e.g. *United States v. Thorton*, 642 F.3d 599, 605 (7th Cir. 2011) (employing "significantly less persuasive" language); *United States v. Yarrington*, 640 F.3d 772, 780 (7th Cir. 2011) (same); *United States v. Hicks*, 635 F.3d 1063, 1073 (7th Cir. 2011) (same); *United States v. Spagnola*, 632 F.3d 981, 988 (7th Cir. 2011) (same); *United States v. Bell*, 624 F.3d 803, 809 (7th Cir. 2010) (same).

In *Delaware v. Van Arsdall*, the Court addressed the harmless error analysis in the context of a Confrontation Clause violation. 475 U.S. 673 (1986). The Court set forth a list of factors to be considered in determining when a Confrontation Clause violation was harmless. The factors demonstrate that the overall strength of the case against the defendant is but one factor to be considered in determining whether an error is harmless. The factors included (1) "the importance of

the witness's testimony in the prosecution's case," (2) "whether the testimony was cumulative," (3) "the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted," and (4) "the overall strength of the prosecution's case." *Id.* at 279.

The Court most directly addressed the tension between the overwhelming evidence test and the effect on the verdict test in *Sullivan v. Louisiana*. 508 U.S. 275 (1993). In *Sullivan*, the Court stated

> Consistent with the jury-trial guarantee, the question it instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. Harmless-error review looks, we have said, to the basis on which the jury actually rested its verdict. The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered-no matter how inescapable the findings to support that verdict might be-would violate the jury-trial guarantee.

Id. at 279. But a few years later in *Neder v. United States*, the Court muddied the waters. 527 U.S. 1 (1999). *Neder* involved a unique factual scenario that the Court had not addressed before: there was a jury instruction error where an element of the offense was omitted. The Court rejected the defendant's argument that under *Sullivan* the error could not be deemed harmless because the jury never reached a verdict with regard to the omitted element. Instead, the Court held that "[i]n a case such as this one, where a defendant did not, and apparently could not, bring forth facts contesting the omitted element, answering the question whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the jury trial guarantee." *Id.* at 19.

Because *Neder* did not purport to overrule *Sullivan*, it leaves a troubling dissonance in the Court's jurisprudence. Did *Neder* hold that the only relevant question is whether the evidence in the record is overwhelming such that a trial without the error would result in a guilty verdict? Or, does *Neder* announce a more subtle rule limited to those rare situations where the error in question is the omission of an element and the record makes clear that the defendant did not and could not have contested the omitted element? The answer to these questions affects thousands of cases every year, yet the answers remain unclear and courts remain free to adopt inconsistent standards of their choosing.

The lion's share of the Court's harmless error jurisprudence points to a hybrid analysis that considers the weight of the untainted evidence, but also looks to the specific circumstances of the case to determine

whether *this* jury could have been influenced by the error. Had the majority below followed this analysis, Mr. Vasquez would have been granted a new trial. The facts plainly indicated that the error concerned the central witness in the trial in the eyes of both the jury and the government. Moreover, had the majority engaged in a detailed analysis of the effect of the error, as the dissent did, it would have granted Mr. Vasquez a new trial.

C. The Choice of Harmless Error Test Was Outcome Determinative in This Case.

The majority below was able to characterize the admission of the defendant's own attorney's statement that the defendant should plead guilty and would lose the case at trial as harmless by considering only the government's untainted evidence and giving no consideration whatsoever to the actual impact that the erroneous admission of counsel's statements for their truth could have had on the jury. Had the majority employed a test that considered the magnitude of the error and its potential prejudicial impact, as well as the concrete indications from the government and the jury that the evidence was critical, it could not have found the error harmless. A proper harmless error analysis looks to three things: (1) the strength of the government's case absent the erroneously admitted evidence, (2) the effect that the error had in the context of the trial, and (3) any indications as to the importance of the evidence to the jury.

Consideration of the weight of the government's

evidence is appropriate because the more untainted evidence there was on which to base a verdict, the less likely it is that the jury relied on the erroneous evidence to reach its verdict. Here, the majority focused on the evidence of flight and the evidence of a prior drug conviction as the government's strongest evidence. Both of these forms of evidence are not only circumstantial, but also have been repeatedly criticized for unduly and unfairly influencing the minds of jurors. See *Michelson v. United States*, 335 U.S. 469, 475-476 (1948)(noting that "[t]he State may not show defendant's prior trouble with the law" because "it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge"); *Wong Sun v. United States*, 371 U.S. 471, 484 n. 10 (1963)("we have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime). The fundamental error in the majority's analysis, however, lies not in its misassessment of the strength of the government's case, but in its failure to consider the prejudicial impact of the error and the central role that it played in the trial.

Perhaps the closest analogy to the error in this case is an erroneously admitted confession. In both cases, there is a direct statement, from a person in a position most likely to know, that the defendant is guilty of the crime with which he is charged and should lose his case at trial. Unlike the incriminating statement of a cooperating witness, the source of the statement (in this case, the defendant's trial attorney) cannot be discredited. The idea that the admission of

what was roughly analogous to a confession of the defendant's guilt did not have any impact on the jury is absurd. Yet, because of their decision to focus only on the untainted evidence and ignore the impact of the error completely, the majority failed to even consider how these statements could have impacted the jurors.

Another factor the majority failed to discuss due to its exclusive focus on the weight of the untainted evidence is the fact that no limiting instruction was given. The district court admitted the statements for the truth of the matter asserted. The jury was given no reason not to accept the statement of Mr. Vasquez's counsel that he should plead guilty and that he would lose at trial for its truth. A jury who actually accepted that evidence could convict based upon that statement alone since it constitutes probative (though inadmissible) evidence on every element of the offense. Therefore, the majority below failed to consider the fact that the erroneously admitted evidence could have reasonably been the sole basis for a juror's decision to convict. There is no way anyone could contend that such erroneously admitted evidence could not reasonably have impacted the jury's verdict.

In *Arizona v. Fulminate*, this Court found that

> [a] confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.... [T]he admissions of a defendant comes from the actor himself, the most knowledgeable and unimpeachable source of information

> about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.'

499 U.S. 279 (1991) (citing *Bruton v. United States*, 391 U.S. 123, 139-140 (1968)(White, J. dissenting)). In *Fulminate*, the defendant had confessed twice and only the first confession was determined to be inadmissible. However, despite a second independent confession, this Court was unable to say the error was harmless. *Id.*

The only case where this Court has found a confession to constitute harmless error was *Milton v. Waintright*. 406 U.S. 371 (1972). In *Miton*, the defendant had confessed to the crime three times and only one was found inadmissible. One of the confessions involved the defendant reconstructing the murder and pictures of this reconstruction were admitted. In no case has this Court ever found that the erroneous admission of a confession was harmless in the absence of another admissible confession.

Here, the trial attorney's assertion that his client would lose the case and should plead guilty amounted to a confession of the defendant's guilt provided by the most reliable of sources. The notion that a jury would be wholly unaffected by the erroneous admission of these statements from trial counsel for their truth is an absurd one. Had the majority below considered the nature and potential impact of the erroneously admitted evidence, it is obvious that it would have come to a different result.

The decision to focus only on the untainted evidence and the question of whether that evidence would convict the defendant absent the erroneously admitted evidence determined the outcome of the case. Had the majority followed the lead of the majority of Circuits and considered the potential impact of the error, the outcome would have been different.

The improperly admitted testimony was admitted for the purpose of undermining the testimony of Marina Perez, who, as the dissent explained, provided an innocent explanation for Mr. Vasquez's presence at the scene of the drug deal. Marina Perez's testimony was damaging enough to the government's case that it sought an emergency continuance to obtain the recordings, which were later erroneously admitted for their truth. The government repeatedly referenced the recordings in its closing argument. But, the most important facts excluded from the majority's analysis were the jury's request to have a transcript of Marina Perez's testimony provided to them and the jury's unanimous decision that the government did not prove beyond a reasonable doubt that Mr. Vasquez attempted to complete the drug transaction. These facts are proof positive that the erroneously admitted evidence was at the forefront of the jurors' minds.

However overwhelming the majority may have found the evidence of flight and the 404(b) evidence to be, the jury did not ask to hear the description of the flight during deliberations. The jury did not ask to see a description of the previous drug convictions. In the final analysis, the jury did not believe the 404(b) evidence was sufficiently probative on intent to find that Mr. Vasquez attempted to possess with intent to

distribute the cocaine. The jury found the government's evidence to be so underwhelming that it acquitted Mr. Vasquez of Count Two despite the government's urging to the contrary. This is compelling evidence that the erroneously admitted statements were at the forefront of the juror's consideration. Had the majority considered these facts, it would almost certainly have come to a different decision. Yet, the majority's reliance only on the overwhelming evidence test prevented any consideration of these fundamental and vital facts, which proved that the jury was almost certainly impacted by erroneously admitted evidence.

Additionally, the majority also failed to consider how the erroneously admitted statements attributed to trial counsel may have impacted Mr. Vasquez's ability to present a defense. Because of the erroneous admission of these statements for their truth, trial counsel was forced to argue the innocence of a defendant who, according to the recordings, he believed to be guilty. The jury was confronted by an attorney who, according to the evidence it could consider for its truth, knew his client to be guilty and believed he should lose the case. The admission of these recordings for their truth discredited Mr. Vasquez's only advocate in the midst of his trial. It made the successful defense of Mr. Vasquez essentially impossible. It is hard to imagine any error that could have had a more severe impact on a jury. No jurist who considered that impact could possibly say it did not affect the jury's verdict. Yet, the majority failed to even consider this impact despite the fact that considering the impact of the error is an essential element of most of its sister Circuits' harmless error analysis and part of the analysis that

was promulgated in *Chapman* by this Court.

The absence of a consistent harmless error test, which requires the consideration of the potential impact of the error on the jury, allowed the majority below to wholly fail to consider the devastating impact that the erroneous admission of a trial attorney's statements that the defendant would lose the case and should plead guilty for their truth. That is an injustice that requires remedy from this Court.

D. The Seventh Circuit's Harmless Error Analysis Denied Mr. Vasquez His Sixth Amendment Right To A Trial By Jury.

The Sixth Amendment guarantees to criminal defendants the right to a trial by jury. U.S. Const. amend. VI. "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered." *Duncan v. State of La.*, 391 U.S. 145, 155 (1968). The invocation of harmless error analysis implicates the jury trial right because one of the purposes of that right is to protect "against arbitrary law enforcement." *Id.* at 156. The harmless error inquiry asks courts to choose which laws and rules are worthy of enforcement in a particular case. When the analysis is not conducted carefully according to the precedents of this Court, it wrests from the hands of the jury the power the Constitution has assigned to juries alone: the power to determine guilt or innocence.

The undeniably laudable goals of the harmless error analysis, efficiency and finality, ultimately must founder upon the shores of perhaps the most fundamental constitutional right: the right to be judged by twelve peers before a criminal conviction can be entered. "The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to "the unanimous suffrage of twelve of his equals and neighbours," rather than a lone [or, in this case, three] employee[s] of the State." *Blakely v. Washington*, 542 U.S. 296, 313 (2004).

As the Court most clearly noted in *Sullivan*, when an appellate court endeavors "to hypothesize a guilty verdict that was never in fact rendered," the court "violate[s] the jury trial guarantee." 508 U.S. at 279. In this case, the majority's exclusive focus on what it believed to be overwhelming evidence without any consideration of the effect of the error on the jury in this case was just such a violation. The majority hypothesized a trial that did not involve the admission, for their truth, of trial counsel's statements that his client should lose the case and plead guilty and based its analysis only on that trial that did not occur. In so doing, the majority denied Mr. Vasquez his right to be tried by a jury. This Court should grant certiorari to remedy this Constitutional violation and set appropriate boundaries for harmless error analysis.

III.

CONCLUSION

The Seventh Circuit's exclusive focus on the strength of properly admitted evidence and failure to consider concrete facts that demonstrate that the error likely affected this jury brings to the forefront the continuing confusion regarding the proper application of the harmless error analysis that is present throughout the circuit courts of appeal and this Court's own jurisprudence. For these reasons, the Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

August 4, 2011

Beau B. Brindley
Joshua J. Jones
Law Offices of Beau B. Brindley
53 West Jackson Blvd.
Chicago, Illinois 60604
Telephone: (312) 765-8878
Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 09-4056

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALEXANDER VASQUEZ, JR.,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 1:08-cr-00625-3—**Charles R. Norgle, Sr.**, *Judge*.

ARGUED NOVEMBER 5, 2010

DECIDED MARCH 14, 2011

Before EVANS, SYKES, and HAMILTON, *Circuit Judges*.

EVANS, *Circuit Judge*. A jury convicted Alexander Vasquez of conspiring to possess more than 500 grams of cocaine with intent to distribute. He was subsequently sentenced to serve a term of 240 months. On appeal, Vasquez asks us to reverse his conviction and remand the case for a new trial on several grounds: that the judge (1) should have excluded evidence of his prior drug conviction; (2) should have granted his motion to suppress evidence found in a warrantless search of an automobile; (3) deprived him of a meaningful opportunity to cross-examine a government

witness; and (4) should not have admitted recordings of telephone conversations between a defense witness and a co-defendant. We begin with the facts.

Vasquez and two co-defendants, Joel Perez and Carlos Cruz, were arrested in Arlington Heights, Illinois, following a failed cocaine transaction. The day's events started in the parking lot of a Shell gas station, moved to a nearby parking lot at a Denny's Restaurant, and finally to the shared parking lot of a Walmart and McDonald's. The deal that flopped began several days earlier when Perez contacted Cruz about obtaining a kilogram of cocaine. Cruz then called Alejandro Diaz, whom he knew to be involved in cocaine deals. Cruz, however, didn't know that Diaz was cooperating with law enforcement agents. Cruz, Perez, and Diaz arranged for a deal to go down in Arlington Heights on August 5, 2008.

On the day that it all came tumbling down, Cruz and Perez, with Cruz driving, went to the Shell station for the deal. There, they met Diaz who instructed them to follow him to another location to get the cocaine. Instead, Perez walked to the Denny's parking lot next door where Vasquez was waiting for him in a black Bonneville. Perez slid into the passenger seat of the car and called Cruz on a cell phone telling him that he was not willing to follow Diaz; he wanted to complete the deal at the current location. Cruz then went to the Denny's lot where he was introduced to Vasquez. Shortly thereafter, Diaz called Cruz to find out why they were not following him. Cruz told Diaz that Perez wanted to complete the deal in the parking lot. Perez told Cruz to tell Diaz that "we got the money here." Vasquez repeated the statement, "tell him we got the

money here." Cruz hung up with the understanding that Diaz was returning to complete the deal.

Several minutes later, and after Diaz contacted his handler, DEA Agent James Chupik, law enforcement agents surrounded the parking lot and approached the Bonneville to arrest Cruz, Perez, and Vasquez. In addition to several unmarked cars, six officers approached the Bonneville on foot. As the officers approached, Cruz, who was outside of the car, raised his hands in surrender. Vasquez's reaction was not nearly as sub- missive. He put the Bonneville in reverse, striking two Arlington Heights police cars. He then shifted gears and headed for the exit. Agent Chupik moved in front of the Bonneville, pointed his gun at Vasquez, and commanded him to stop. But Vasquez showed no signs of stopping so Agent Chupik jumped out of the way as the Bonneville sped out of the parking lot heading west onto the eastbound lanes of Algonquin Road.

A few minutes later, police located the Bonneville abandoned in a nearby Walmart parking lot. A bystander told the police he saw two men run from the vehicle toward a McDonald's. An Arlington Heights detective pursued Vasquez and Perez as they ran through the kitchen of the McDonald's and then out the back door.

At that point, Vasquez and Perez split up, each running in a different direction. But the chase was short lived—they were quickly apprehended by Arlington Heights police. The police found a cell phone on Vasquez, and two cell phones on the ground near Perez. Phone records showed that there were calls between Vasquez and both of Perez's phones the day

before and the day of the arrest.

The Arlington Heights police towed the Bonneville to the police station. During a search of the car later that day, they found a hidden compartment in the passenger side of the dashboard containing $23,000 in cash.

Based on this evidence, a federal grand jury returned an indictment charging Vasquez with conspiring to possess with intent to distribute more than 500 grams of cocaine and with attempting to possess with intent to distribute more than 500 grams of cocaine, each in violation of 21 U.S.C. § 846.

As the case progressed, Vasquez filed a motion to suppress the evidence recovered from the search of the Bonneville and the government filed a motion to admit, pursuant to Federal Rule of Evidence 404(b), evidence of Vasquez's involvement in a cocaine trans- action in 2002. The district judge denied Vasquez's motion and granted the motion filed by the government. The judge found that the police had probable cause to search the Boneville and that the 2002 cocaine transaction, which resulted in a conviction, was admissible to show Vasquez's knowledge and intent under Rule 404(b).

At trial, Agent Chupik testified for the government. Among other things, he testified that he instructed Diaz to have Cruz and his "customers" come to a gas station in Arlington Heights for the transaction. But according to the actual transcript of the call, which the government later published, Cruz referred to a single customer as "him" and "this dude." On cross-examination, Vasquez's counsel attempted to impeach Agent Chupik on this point by refreshing his

memory. The judge limited cross-examination, however, finding that the difference between "customers" and "customer" in this instance was a trivial detail.

Later in the trial, Vasquez called several witnesses, including Perez's wife, Marina. Later still, the judge allowed the government to recall Marina to the stand and, among other things, question her about telephone conversations she had with her husband while the case was still pending.

Ultimately, the jury found Vasquez guilty on the conspiracy count and not guilty on the attempt charge. Issues concerning the recall of Marina to the stand and the telephone conversations she had with her spouse are at the heart of Vasquez's appeal, but we will put them aside for the moment as we consider the other issues raised on Vasquez's appeal.

We begin with Vasquez's claim that the judge should have precluded the government from introducing his prior drug conviction to show his knowledge and modus operandi pursuant to Rule 404(b). We review the judge's ruling for an abuse of discretion. *United States v. Conley*, 291 F.3d 464, 472 (7th Cir. 2002). We will reverse only if the record contains no evidence on which the judge rationally could have based his ruling. Id.

Rule 404(b) provides that evidence of prior acts is admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," but not "to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b). We apply a four-part

test to decide whether Rule 404(b) evidence was properly admitted and will find no error if:

> (1) the evidence is directed toward establishing a matter in issue other than the defendant's propensity to commit the crime charged; (2) the evidence shows that the other act is similar enough and close enough in time to be relevant to the matter in issue; (3) the evidence is sufficient to support a jury finding that the defendant committed the similar act; and (4) the evidence has probative value that is not substantially outweighed by the danger of unfair prejudice.

United States v. Vargas, 552 F.3d 550, 554 (7th Cir. 2008).

Here, the government introduced Vasquez's prior conviction to show that he had previously carried out a cocaine deal with Perez using a hidden compartment in a car. The evidence was not used to show propensity, but rather to show modus operandi. United States v. Montoya, 891 F.2d 1273, 1285 (7th Cir. 1989) (upholding admission of evidence under a modus operandi theory when prior drug offense involved the defendant working with the same person, using a car registered to another person, and using a hidden compartment in the car).

The prior drug deal with Perez was certainly important as it showed that Vasquez's position that he was merely an innocent bystander was a smoke screen. See *United States v. Chavis*, 429 F.3d 662, 668 (7th Cir. 2005) (evidence of a prior drug conviction is admissible when a defendant claims that he was "simply in the wrong place at the wrong time"); *Vargas*,

552 F.3d at 555-56 (evidence that defendant had previously transported narcotics in a trailer made it more likely that he knew about the drugs hidden in the trailer in the instant case, and less likely that he was an innocent victim).

Finally, limiting "instructions 'are effective in reducing or eliminating any possible unfair prejudice from the introduction of Rule 404(b) evidence.'" *United States v. Jones*, 455 F.3d 800, 809 (7th Cir. 2006) (internal citations omitted). Here, the judge properly instructed the jury regarding the purposes for which the Rule 404(b) evidence was introduced.

Therefore, the introduction of Vasquez's prior conviction clearly passes the admissibility test. It was admissible to show Vasquez's knowledge, intent, absence of mistake and modus operandi. The judge did not abuse his discretion in admitting the 2002 cocaine-related conviction.

Next, Vasquez argues that the judge should have granted his motion to suppress the money discovered during the search of the Bonneville. He argues that the police violated his Fourth Amendment rights when they conducted a warrantless search of the car after he was taken into custody. We review a district judge's denial of a suppression motion under a dual standard: "the Court reviews legal conclusions de novo and findings of fact for clear error." *United States v. Jackson*, 598 F.3d 340, 344 (7th Cir. 2010).

The search issue is a dead-bang loser. For one thing, the Bonneville was abandoned, and it's hard to see, under the circumstances here, how Vasquez could argue with a straight face that he maintained an

expectation of privacy in it after he ditched it and bolted off on the run. On top of that, it's clear that the pursuing police had abundant probable cause to believe that drug money was in the car. What was the probable cause? Well, (1) Cruz told Diaz that Vasquez and Perez had the money with them; (2) no money was found during the searches of Vasquez and Perez; and (3) two drug- detection dogs indicated that there were narcotics in the passenger-side dashboard of the car. The motion to suppress was properly denied.

Vasquez also claims that the judge denied him a meaningful opportunity to cross-examine Agent Chupik, in violation of his Sixth Amendment right to confront wit- nesses against him. "Limitations on cross-examination rise to the level of a Sixth Amendment violation when they prevent the exposure of a witness' bias and motivation to lie." *United States v. Smith*, 308 F.3d 726, 738 (7th Cir 2002). But the right to cross-examination is not with- out limitation:

> [T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.

Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986). A Sixth Amendment violation occurs when the defendant shows that he was denied the opportunity to elicit testimony that would be "relevant and material to the defense." *United States v. Williamson*, 202 F.3d 974, 979 (7th Cir. 2000) (internal citation omitted). In this case, the judge found that the information Vasquez

hoped to elicit from Agent Chupik, which Vasquez argues shows bias, was trivial and a collateral issue, and therefore not relevant. We review the judge's ruling for abuse of discretion. *Id.*

Vasquez argues that the judge erred by refusing to allow his counsel to attempt to impeach Agent Chupik with a supposedly inconsistent statement he made in an affidavit. Specifically, when discussing the calls between Cruz and Diaz, Agent Chupik said in his affidavit that there were "customers." In fact, the calls only refer to a single customer. The government points out, however, that in the rest of the affidavit, Agent Chupik refers to a single customer, undercutting Vasquez's argument that Agent Chupik was deliberately lying. If anything, it suggests that Agent Chupik simply misspoke. Moreover, Agent Chupik's affidavit was based on a draft transcript that had been translated from Spanish to English, and neither the draft transcript nor the affidavit were presented to the jury.

It is within the discretion of a trial judge to limit cross- examination, especially when, as here, the discrepancies are minor. See *United States v. Mojica*, 185 F.3d 780, 788-89 (7th Cir. 1999) (district court did not abuse discretion in limiting cross-examination of a witness regarding prior drug use when the inconsistencies were "no more than minor discrepancies"). Thus, the judge did not abuse his discretion when he limited Vasquez's cross-examination of Agent Chupik.

Vasquez also argues that the judge erred in ruling that the he could not use transcripts to refresh Agent Chupik's memory. The Government acknowledges that

this was an error, but responds that it was harmless because the judge ruled irrelevant the point on which Vasquez was trying to refresh Agent Chupik's memory. Evidentiary rulings are reviewed for an abuse of discretion. *United States v. Schalk*, 515 F.3d 768, 774 (7th Cir. 2008).

Vasquez is correct—the judge incorrectly stated that there was "no basis to cross-examine with respect to something not in evidence." A document does not need to be "admissible as substantive evidence in order to be used for the purposes of impeaching a witness (or refreshing his recollection)." *Pecoraro v. Walls*, 286 F.3d 439, 444 (7th Cir. 2002). But the government is correct that it is within the judge's discretion to preclude counsel from refreshing a witness' memory on a point the judge has ruled trivial and a collateral issue. There- fore, while the judge's ruling was in error, it was harmless error at best in this case.

Finally, we turn to Vasquez's primary argument, the resolution of which is where we part company with our dissenting colleague. Vasquez asserts that the district judge erred in several respects regarding the recalling of Marina as a witness in the government's rebuttal case and, more importantly, in admitting into evidence the Metropolitan Correctional Center (MCC) recordings of her telephone conversations with her husband.

There's no doubt that Vasquez's trial would have been cleaner had Marina Perez not been injected into the show. But to put things in perspective, it's best to step back for a moment and look at the big picture. Joel Perez and Cruz pled guilty to the charges against them. Vasquez, however, elected to go to trial. Instead

of relying on a generalized defense—that the government failed to prove his guilt beyond a reasonable doubt—Vasquez elected to offer something in the nature of an actual affirmative "defense" on the merits. It would be that he was only an innocent bystander who just happened to be in the wrong place at the wrong time. In the real world of criminal court trials, that sort of "defense" is difficult to sell. And it's especially hard to sell when a defendant, like Vasquez here, elects not to take the stand and tell the jury his version of how he just happened to be where the drug deal was about to go down. So how does he get this "defense" before the jury? Enter Marina. She was his only hope, and a slim one at that.

When called by Vasquez as a witness, Marina said that her husband, earlier in the day, asked her to pick him up at the place where the drug deal died. But later, she asked Vasquez to go in her place. He agreed, and he took the Bonneville, rather than his own car, only because it was more convenient to do so. So if believed, the jury might think that Vasquez had no idea a drug deal was in play and that he just showed up by pure happenstance with a car full of cash stashed away in a hidden compartment. The if is a mighty big if, especially when one considers that the jury knew that Vasquez had participated in a remarkably similar drug deal involving cocaine, Perez, some $15,000 in cash, and a car in 2002.

The government obviously thought Marina's tale was a fish story. Based on the way the case stood at the time, the government could have let Marina leave the stand after a short cross-examination. That might have been the safest course to take. But instead, the

government filed a motion to continue the trial over the weekend based on recordings it had obtained of telephone conversations between Marina and her husband, who was incarcerated at the MCC at the time. The government argued that the conversations between the two went directly to the truthfulness and accuracy of Marina's testimony and raised potential conflict-of- interest issues. Vasquez's counsel objected to the government's motion to no avail. The judge held that the MCC recordings were admissible as extrinsic evidence of Marina's interest, bias and prejudice, and of her prior inconsistent statements.

When the trial resumed, the government called Marina in its rebuttal case and published four recorded conversations between her and her husband. During questioning, Marina acknowledged that she had met with Vasquez's lawyer several times before August 20, 2009 (the only meeting she mentioned in her direct testimony). She also admitted that she understood that Vasquez's lawyer could get Perez a lower sentence and that the lawyer wanted Perez to enter a plea and avoid implicating Vasquez. Defense counsel's objection to Marina's testimony was overruled. And then the MCC recordings came in. They included this exchange:

> Marina: So what'd Beau [Vasquez's lawyer] tell him [Vasquez]? What did Beau tell him?
>
> Perez: A blind plea would be good, then he can guarantee this and that. You know what I mean? Just certain things, you know? I got to explain to you.
>
> Marina: He's telling him about a blind plea

also?

Perez: Yeah, he is. I gotta explain to you. You know what I mean. He says, if you want, have his wife talk to me, this or that. I have to explain to you tomorrow.

The jury also heard Marina tell her husband that Vasquez's lawyer also said "everybody is going to lose" if they go to trial.

Vasquez argues that the judge abused his discretion in allowing the government to recall Marina during its rebuttal case solely for the purpose of impeachment. He is correct that "a party may not call a witness for the sole purpose of impeaching him." *United States v. Giles*, 246 F.3d 966, 974 (7th Cir. 2001). But Rule 611 gives the district court authority to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . make the interrogation and presentation effective for the ascertainment of the truth." Fed R. Evid. 611. Furthermore, the judge has "broad discretion to determine whether the government's evidence [falls] within the proper scope of rebuttal." *United States v. Liefer*, 778 F.2d 1236, 1249 n.11 (7th Cir. 1985) (no error when court allowed government to recall two defense witnesses as government rebuttal witnesses).

Here, the government recalled Marina after it discovered the recorded conversations because it believed that they proved she was biased. Vasquez argues that the judge abused his discretion in allowing the government to recall Marina because it had an opportunity to cross-examine her previously. But there

is no authority for the odd proposition that allowing a party to recall a witness based on new information is an abuse of discretion. The government sought to introduce evidence that one of Vasquez's main witnesses was biased. The judge did not abuse his discretion in allowing the government to recall Marina for this purpose.

Second, Vasquez argues that the MCC recordings were inadmissible hearsay. Extrinsic evidence of a witness' bias, however, is admissible to impeach that witness and is never a collateral issue. *United States v. Lindemann*, 85 F.3d 1232, 1243 (7th Cir. 1996). In the recordings, Marina says she talked with Vasquez's counsel several times about the future of both Vasquez and her husband, and that she believed counsel could help her husband get a lower sentence. The government offered the recordings to prove that Marina had an incentive to lie—to get her husband a lower sentence. Moreover, when the government questioned Marina about the calls, her answer supported the government's theory:

> Government: And you thought that the defendant's attorney was recommending that your husband enter a plea where he did not admit the role of Alexander Vasquez, isn't that right?
>
> Marina Perez: Where [Perez] did not admit, yes, be- cause [Vasquez] is going to trial.

Accordingly, Marina's testimony and the MCC recordings were admissible as extrinsic evidence to show

Marina's bias and interest in trying to get her husband a lower sentence.

The recordings are also admissible as prior inconsistent statements. Vasquez argues that prior inconsistent statements must be "in fact inconsistent" under Federal Rule of Evidence 613. *United States v. Crovedi*, 467 F.2d 1032, 1037 (7th Cir. 1972). But "two statements need not be diametrically opposed to be inconsistent." *United States v. Jones*, 808 F.2d 561, 568 (7th Cir. 1986). Here, the government argued that Marina's statements to her husband—that he and Vasquez were in trouble and likely to be convicted—is arguably inconsistent with her story that it was her idea that Vasquez took the Bonneville on the day of the deal. While there may well be other ways to look at this situation, we do not believe that the judge abused his discretion in permitting her to be questioned on the point.

The admission into evidence of the MCC recordings themselves, however, is a horse of a different color. The government argues that the judge did not err because it never sought to admit the recordings for their truth. But the government's argument ignores the fact that the judge said, without question, that "[w]ith respect to interest, bias, and prejudice . . . if any of these statements can be interpreted as such to indicate an interest, bias or prejudice, *they would go in for their truth*." (emphasis added). Vasquez is correct—on this point, the judge made the wrong call. But Vasquez gets no traction on this point if the error in admitting the MCC recordings for their truth was harmless. See *United States v. Olano*, 507 U.S. 725, 734 (1993). "The test for harmless

error is whether, in the mind of the average juror, the prosecution's case would have been 'significantly less persuasive' had the improper evidence been excluded." *United States v. Emerson*, 501 F.3d 804, 813 (7th Cir. 2007). On appeal, the burden lies on the government to prove that a reasonable jury would have reached the same verdict without the challenged evidence. *United States v. Williams*, 493 F.3d 763, 766 (7th Cir. 2007).

Looking at the evidence as a whole, although the issue is close, we believe that the error was harmless. What was the evidence? We start with Vasquez's flight as possible evidence of guilt. While we agree with our dissenting colleague that flight evidence must be viewed with caution, *United States v. Robinson*, 161 F.3d 463, 469 (7th Cir. 1998), we think it's important to note that there are degrees of flight. A defendant walking down a street who runs into a yard and then into a house after he hears an officer say, "Stop, police" is one thing. The flight here goes far beyond that. If there were degrees of flight, what happened here would be flight in the first degree. How else do you describe throwing the Bonneville into reverse, endangering officers (recall that Agent Chupik, with gun drawn, had to jump out of the way), hitting two police squad cars, and gunning it the wrong way into a roadway from the parking lot, ditching the car a few moments later and trying to escape by running through the kitchen and out the back door of a McDonald's?

Add to that, we have the cell phone logs showing several Perez\Vasquez contacts leading up to the aborted deal and Vasquez saying to Cruz "tell him we got the money here." And then there's the striking similarity between this caper and the one (also with

Perez) that lead to Vasquez's drug conviction in 2002. The $23,000 in cash found in the hidden compartment of the Bonneville (recall $15,000 was hidden in the car during the 2002 deal) puts a little frosting on the cake. This evidence, we believe, would have moved the jury to convict Vasquez without a nudge from anything it heard in the government's rebuttal case.

For these reasons, the judgment of the district court is AFFIRMED.

HAMILTON, Circuit Judge, dissenting. I respectfully dissent. I agree with my colleagues that the district court did not abuse its discretion by allowing evidence of Vasquez's 2002 conviction, by allowing evidence found in the search of the automobile, or by limiting the cross-examination of Agent Chupik. I also agree that the district court's error in preventing the defendant from refreshing Agent Chupik's recollection was harm- less. However, I cannot agree that the MCC tapes were admissible or that the district court's errors in admitting the MCC tapes were harmless. I would reverse the conviction and remand for a new trial.

Marina Perez's second visit to the witness stand in the government's rebuttal case, to explore a phantom inconsistency and to admit erroneously the MCC tapes, caused unfair prejudice to the defendant. The jury heard evidence that the defendant's lawyer had advised him to plead guilty and had said that if the three defendants went to trial, "everyone is going to lose." That evidence had no genuine probative value, and it is difficult to imagine more prejudicial evidence. Even if a limiting instruction telling the jury that such damaging evidence should not be considered for the

truth of the matters asserted could have been effective, which I doubt, no instruction was given. The district court admitted the rebuttal evidence as proof of the truth of the matters asserted in the taped MCC telephone calls, which my colleagues and I all agree was an error.

The whole episode made for a fairly dramatic conclusion for the trial. The defense case concluded on a Thursday, and the trial recessed for the weekend. On Sunday, the government filed an emergency motion for a continuance to prepare a rebuttal case using the MCC tapes of Marina Perez's conversations with her husband. On Monday, the court allowed the delay and sent the jury home. Mrs. Perez was called to testify again on Tuesday. In her testimony, she admitted the key legitimate point that the government was entitled to make: that she expected or at least hoped that Vasquez's lawyer could help her husband receive a lighter sentence. But the government's rebuttal did not stop there. After Mrs. Perez testified, the government played the tapes through another witness. On Wednesday, after further drama, the case was given to the jury.3 Mrs. Perez's testimony and the government's attempted impeachment figured prominently in the government's closing argument to the jury. Then, after the jury had heard that Vasquez's attorney had told him to take a plea and that he was going to lose at

---

1 The further drama included the government threatening Vasquez's lawyer with investigation and prosecution, Tr. 571, and the court holding Joel Perez in contempt of court because he refused to testify and telling him that he faced life in prison if he continued to refuse. Tr. 578-79. After that finding and threat, the government said: "I don't know if we need Mr. Perez still or not." Tr. 579. He did not testify.

trial, that same attorney rose, with his credibility destroyed, to give closing argument on Vasquez's behalf.

One theory for questioning Mrs. Perez about the MCC tapes and then admitting the tapes was that they were prior statements by Mrs. Perez that were inconsistent with her trial testimony for the defense. But inconsistent with what? Mrs. Perez testified that Vasquez drove to the site of the drug meeting because she asked him to pick up her husband with the Perez's car. Nothing in the MCC tapes is inconsistent with that testimony. The government's theory was that Mrs. Perez's belief that Vasquez would be convicted was inconsistent with her testimony that it was her fault that Vasquez happened upon the scene of the transaction. See Gov't Br. 18. The theory seems to be that if Mrs. Perez's trial testimony were honest, she necessarily would have believed that as long as she testified truthfully, the jury would unerringly find Vasquez not guilty. Because she was very worried that Vasquez would be convicted, goes the theory, the jury should conclude that she lied in her trial testimony.

That theory of the supposed inconsistency makes sense only if we assume that, if Mrs. Perez was telling the truth, she also must have had an extraordinary and even naive confidence in the infallibility of juries in telling the difference between true and false testimony. Any citizen who has followed recent news of exonerations of innocent but convicted defendants would be entitled to worry. One can be a great believer in the wisdom of juries, as I am, without assuming they are infallible. Let's assume for purposes of argument that Mrs. Perez's testimony about asking Vasquez to

drive the Perez's car to pick up her husband was true. Even so, anyone as familiar as she was with the evidence against both her husband and Vasquez—who were then both in the federal lock-up under federal indictment—could reasonably worry that she might not be believed. If a witness's expression of the view that a trial might come out the wrong way can be treated as inconsistent with the witness's testimony for the "right" result, we will see more cases with attempted impeachment like this.

I recognize that a prior statement need not be "diametrically opposed" with a witness's testimony to be inconsistent, but genuine inconsistency is still necessary. See *United States v. Hal*e, 422 U.S. 171, 176 (1975); *United States v. Jones*, 808 F.2d 561, 568 (7th Cir. 1986); accord, *United States v. Cody*, 114 F.3d 772, 776-77 (8th Cir. 1997). The supposed inconsistency here was non-existent. It was an abuse of discretion to admit the evidence on that theory.4

The government's bias theory also does not justify admission of the MCC tapes. Evidence of a witness's bias is always relevant, of course. See, e.g., *United States v. Lindemann*, 85 F.3d 1232, 1243 (7th Cir.

---

2 My colleagues also suggest that Mrs. Perez failed to disclose several meetings with Vasquez's lawyer when she testified in the defense case. Slip op. at 12-13. She testified about the only meeting she was asked about. Tr. 419. The fact that she had other meetings, which she was not asked about, was not inconsistent with her testimony. A witness should not be impeached for having failed to volunteer information not sought by the questioner. In fact, in a criminal trial, volunteered information often poses a greater danger to the fairness of the trial than omissions do.

1996). But the first problem here is that before the MCC tapes were admitted, Mrs. Perez had already admitted the asserted bias: she hoped that Vasquez's lawyer would help her husband receive a lower sentence. There was no need for further extrinsic evidence of the point, especially where that extrinsic evidence posed all the problems that the MCC tapes did here. In light of Mrs. Perez's candid (if perhaps naive) admission, the tapes provided no or little additional probative value, but caused substantial unfair prejudice to defendant Vasquez.

Neither theory of admission—prior inconsistent statements or evidence of bias—supported admission of the MCC tapes at all. My colleagues and I agree at least, however, that the district court erred in admitting the MCC tapes for the truth of the matters asserted by the speakers. Bias is not an exception to the hearsay rule, and even genuinely inconsistent statements are not admissible for the truth of the matters asserted. In this case, the tapes included hearsay, double hearsay, and even triple hearsay. In the most extraordinary and prejudicial example, the jury heard Joel Perez tell Marina Perez that Vasquez had told him that Vasquez's lawyer had told Vasquez that he should plead guilty:

> Marina: So what'd Beau [Vasquez's lawyer] tell him [Vasquez]? What did Beau tell him?
>
> Joel: A blind plea would be good, then he can guarantee this and that. You know what I mean? Just certain things, you know? I got to explain to you.

Marina: He's telling him about a blind plea also?

Joel: Yeah, he is. I gotta explain to you. You know what I mean. He says, if you want, have his wife talk to me, this or that. I have to explain to you tomorrow.

Supp. App. 13.[5] The jury also heard Marina Perez tell her husband that Vasquez's lawyer (who was his lead trial attorney) had told her that if the three defendants went to trial, "everybody is going to lose." Supp. App. 11. The government highlighted that comment in its questioning of Mrs. Perez. Tr. 528-29. The erroneous admission of this highly prejudicial hearsay and triple hearsay for the truth of the matters asserted should require a new trial.

My colleagues conclude, however, that the erroneous treatment of the MCC tapes evidence was harmless because the government had so much other evidence against Vasquez. I respectfully disagree. The issue is whether the reviewing court is "convinced that the jury would have convicted even absent the error." *United States v. Simmons*, 599 F.3d 777, 780 (7th Cir. 2010) (holding that arguable errors in admitting

---

3 The government argues for a different interpretation, that Joel Perez was telling Marina that Vasquez's lawyer had told Joel that Joel should enter a blind guilty plea (i.e., a plea with- out an agreement). In context, the better reading, and certainly a permissible interpretation available to the jury, is that both Joel's lawyer and Vasquez's lawyer were telling their respective clients that they should enter blind guilty pleas. That explains Marina's "also," since Joel's lawyer was advising him at the time to enter a blind plea.

evidence were harmless in light of defendant's own admissions about his involvement in crime). The standard calls upon an appellate court not to "become in effect a second jury," see *Neder v. United States*, 527 U.S. 1, 19 (1999), but to determine "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id.* at 15, quoting *Chapman v. California*, 386 U.S. 18, 24 (1967). Accord, e.g., *United States v. McGowan*, 590 F.3d 446, 456 n.1 (7th Cir. 2009); *United States v. Williams*, 493 F.3d 763, 766 (7th Cir. 2007).

The standard is not easy to satisfy, and four factors here lead me to conclude this error was not harmless: the modest strength of the rest of the government's case against Vasquez, the prejudicial character of the evidence that was admitted erroneously, the fact that the jury acquitted Vasquez of one of two charges, and the importance that the government itself attributed to its flawed rebuttal evidence.

Looking first at the strength of the rest of the case, we can all agree that the government had a solid case against both Perez and Cruz. Both were recorded making arrangements for the cocaine purchase, and both showed up at the agreed time and place. The case against Vasquez was not as clear. Vasquez was not recorded at all. He was not even mentioned in any of the recorded calls. The agents, the confidential informant, and even Cruz were expecting only a single customer to show up for the meeting. They knew nothing about Vasquez until they saw him arrive in the Perez's car at the nearby Denny's parking lot, from where he could see Perez and Cruz. He never got out of the car, and

the agents did not hear him talk with anyone.

On the other hand, of course, Vasquez arrived at the scene of a planned drug meeting driving a car carrying $23,000 in a hidden compartment. He fled in the car, dramatically and dangerously, as the agents tried to make the arrests. He had previously been convicted of a drug deal with Perez using a car with a similar hidden compartment. And Cruz testified that he heard Vasquez tell Perez on the telephone: "tell him we got the money here."

Let's put aside the flight evidence for a moment and focus on the other evidence. Marina Perez's testimony provided an innocent explanation for Vasquez's presence on the scene in the car with the hidden money. She said she planned to pick up her husband but had an argument with him. She asked Vasquez to pick him up and to take the Perez's car because his own was parked in by that car. The credibility of her testimony is at least debatable. And Cruz, the co-defendant who set up the meeting with the informant, testified that Perez was not even supposed to bring any money to the meeting, Tr. 237- 38, which is at least consistent with her testimony.

Cruz's testimony about Vasquez's statement, "tell him we got the money here," was important. Apart from the flight evidence, it was the strongest evidence against Vasquez, and it was actually inconsistent with Marina Perez's testimony. My colleagues treat the statement as an undisputed fact, but that is a mistake when we are evaluating whether an error was harmless. The credibility of that key bit of testimony was subject to strong attacks, far stronger than the government's attacks on Mrs. Perez's testimony. Cruz

was a cooperating defendant with powerful incentives to help the government prove its case against Vasquez, the only one of the three who went to trial. On the witness stand, Cruz admitted having lied to the government about Vasquez and several other subjects. Tr. 250-52, 254-56, 268-72, 289. Most important, Cruz admitted that he first told the government about Vasquez's supposed "money" comment less than one week before trial. Tr. 263-64. By that time, Cruz had already been debriefed by the government several times, all without ever mentioning the single most damaging part of his testimony against Vasquez. On this record, the jury could easily have treated the "money" comment as a late and false invention by Cruz. The Rule 404(b) evidence—the prior conviction—was strong evidence, but it remained 404(b) evidence that could not make the case by itself.

Without the flight evidence and the MCC tapes erroneously admitted for their truth, then, the government had evidence that was legally sufficient to convict Vasquez, but the case was far from a slam-dunk. The dramatic evidence of the dangerous flight strengthened the case substantially and makes it easier for my colleagues to describe the district court's error as harmless. But the flight evidence cannot carry that much weight, in my view. The Supreme Court and we have repeatedly cautioned against too much reliance on flight as evidence of guilt for the crime charged because there are so many links in the chain of inferences:

We have long adhered to the Supreme Court's cautionary language urging courts to be wary of the probative value of flight evidence. See *Wong Sun v.*

United States, 371 U.S. 471, 483 n.10 (1963) ("[W]e have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime."). While we allow evidence of flight to be presented, courts must engage in careful deliberation when considering its admission. Determination of the probative value of flight as evidence of a defendant's guilt depends on the degree of confidence with which four inferences can be drawn: (1) from behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged. See *United States v. Levine*, 5 F.3d 1100, 1107 (7th Cir. 1993); see also *United States v. Jackson*, 572 F.2d 636, 639 (7th Cir. 1978) (adopting this analysis as set forth in *United States v. Myers*, 550 F.2d 1036, 1049 (5th Cir. 1977)).

United States v. Robinson, 161 F.3d 463, 469 (7th Cir. 1998). If we follow that cautious approach to flight evidence, we should not rely on it to save the jury's verdict from the error we all agree was made in admitting the highly prejudicial evidence from the MCC tapes.

We must also consider the prejudicial effect of the improper evidence. The evidence from the MCC tapes, admitted here erroneously for their truth and with no true probative value, was just about as prejudicial as one could expect to encounter in a trial. The jury heard that Vasquez's lawyer—the man who would soon make a closing argument asking them to find reasonable doubt in the government's case—had told Vasquez that he should plead guilty and had said that if he and his

co- defendants went to trial, "everyone is going to lose." A juror who heard and believed that evidence would surely discount anything she heard from that lawyer. In terms of prejudice, these harpoons are com- parable to evidence of a defendant's own withdrawn guilty plea. Such a plea is virtually never admissible because of its powerful force. See Fed. R. Evid. 410(1); *Kercheval v. United States*, 274 U.S. 220, 223-24 (1927).

We also have strong indications from both the jury and the government itself that the erroneous admission of the MCC tapes was not harmless. Even with the prejudicial and erroneous evidence, the jury still found Vasquez not guilty on the charge of attempted possession with intent to distribute. That verdict is hard to reconcile with the jury's conviction on the conspiracy charge, and the split verdict certainly has the whiff of a compromise verdict in a close case. Such verdicts are permissible in criminal cases, of course, but when deter- mining whether, beyond a reasonable doubt, a conceded error was harmless, we should not ignore that strong signal that the jury viewed the case as a close one, even with the evidence of flight and the improper rebuttal evidence.

The government also showed how important it believed the improper rebuttal evidence was by its extra- ordinary efforts to obtain its admission. The trial seemed nearly over when the government filed its emergency Sunday motion for a continuance to enable it to prepare this rebuttal case. The events of the next several days, including especially the government's emphasis on the improper evidence in its closing argument, showed that the government believed that Mrs. Perez had seriously weakened its case and that

the improper rebuttal evidence strengthened its case considerably. My colleagues disagree with that assessment, but in applying the harmless error standard, we should give more weight to the views of the party who sought admission of the improper evidence, as shown by that party's conduct at trial.

I am not trying to suggest that Vasquez is actually innocent or that I necessarily believe Marina Perez's testimony about why he was in the car at the scene of the bust. Those are questions for the jury. But in light of the closeness of the case, the highly prejudicial nature of the improper evidence, the jury's split verdict, and the government's emphasis on the improper evidence, I am not convinced beyond a reasonable doubt that the jury would have convicted Vasquez in the absence of the improper and highly prejudicial MCC tape evidence. I would vacate the judgment and order a new trial.

3-14-11

APPENDIX B

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

May 10, 2011

Before
TERENCE T. EVANS, Circuit Judge
DIANE S. SYKES, Circuit Judge
DAVID F. HAMILTON, Circuit Judge

No. 09-4056
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ALEXANDER VASQUEZ, JR.,
Defendant-Appellant.

Appeal from the United States
District Court for the Northern
District of Illinois, Eastern Division.
No. 1:08-cr-00625-3
Charles R. Norgle, Sr.,
Judge.

O R D E R

On March 28, 2011, the defendant-appellant filed a petition for rehearing and for rehearing en banc. All of the judges on the panel have voted to deny rehearing, and no judge in active service has requested a vote on the petition for rehearing en banc. It is therefore ordered that the petition for rehearing and for rehearing en banc is DENIED.